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OF TEXAS

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PRICE DANIEL  
ATTORNEY GENERAL

November 19, 1951

Hon. Wm. L. Taylor  
Prosecuting Attorney  
Harrison County  
Marshall, Texas

Opinion No. V-1348.

Re: Legality of using county  
equipment and materials  
to construct driveways on  
private property.

Dear Sir:

Your request for an opinion is substantially as follows:

If a property owner in Harrison County requests a County Commissioner to build on the owner's private property a driveway entering a county or state road, and the county commissioner does so, using county materials, machinery, and labor, is the county commissioner subject to prosecution under Article 95 of the Penal Code of the State of Texas?

The decisions of the Texas courts have repeatedly held that the commissioners' court is a court of limited jurisdiction and has only such powers as are conferred upon it, either by express terms or by necessary implication, by the statutes and the Constitution of this state. Childress County v. The State, 127 Tex. 343, 93 S.W.2d 1011 (1936); Von Rosenberg v. Lovett, 173 S.W. 508 (Tex. Civ. App. 1919, error ref.); Roper v. Hall, 280 S.W. 289 (Tex. Civ. App. 1925); Art. 2351, V.C.S.; 11 Tex. Jur. 632, Counties, Sec. 95.

The only statute we have found which authorizes the use of county road equipment for improvements on private property is Article 2372c, V.C.S., authorizing the commissioners' court to use road equipment and machinery in soil conservation work, for which the county receives compensation from the persons for whom the services are performed. We do not find any statute authorizing the use of county road materials and equipment for the construction of a private road. And in view of Section 52

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of Article III, Constitution of Texas, any statute which attempted to authorize the use of county material and equipment for private purposes without compensation to the county would be unconstitutional. See Dunlap v. Hardin, 223 S.W. 711 (Tex. Civ. App. 1920); Gray v. Lewis, 88 S.W.2d 603 (Tex. Civ. App. 1935); Att'y Gen. Op. 0-6670 (1945), qualified on other points in Att'y Gen. Op. 0-6908 (1945).

Article 95, V.P.C., provides:

"If any officer of any county, city or town, or any person employed by such officers, shall fraudulently take, misapply, or convert to his own use any money, property or other thing of value belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment, or shall secret the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two nor more than ten years." (Emphasis added.)

It is our opinion that a county commissioner who delivers county road material to an unauthorized private project may be subject to prosecution under Article 95. However, the answer to your question would be controlled by the facts of the individual situation. This office does not pass upon fact questions, but the general rules of law stated above may be of help to you in considering specific fact situations.

#### SUMMARY

The use of county material and equipment in the construction of private roads is unauthorized, and is a violation of Art. 95, V.P.C., if all

the elements of the offense prescribed by that  
statute are present.

APPROVED:

Yours very truly,

J. C. Davis, Jr.  
County Affairs Division

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